

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 02, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIE E.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-cv-00344-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 19

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 18, 19. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 18, and grants Defendant's motion, ECF No. 19.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§
2 404.1502(a), 416.920(a). Further, a district court “may not reverse an ALJ’s
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where
4 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at
5 1115 (quotation and citation omitted). The party appealing the ALJ’s decision
6 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
7 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
15 impairment must be “of such severity that he is not only unable to do his previous
16 work[,] but cannot, considering his age, education, and work experience, engage in
17 any other kind of substantial gainful work which exists in the national economy.”
18 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§

1 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
2 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
3 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(b), 416.920(b).

6 If the claimant is not engaged in substantial gainful activity, the analysis
7 proceeds to step two. At this step, the Commissioner considers the severity of the
8 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
9 claimant suffers from "any impairment or combination of impairments which
10 significantly limits [his or her] physical or mental ability to do basic work
11 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
12 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
13 however, the Commissioner must find that the claimant is not disabled. *Id.*

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. *Id.*

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
8 capable of performing other work; and 2) such work “exists in significant numbers
9 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
10 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On May 23, 2018, Plaintiff applied both for Title II disability insurance
13 benefits and Title XVI supplemental security income benefits alleging a disability
14 onset date of December 31, 2017.² Tr. 15, 60-61, 180-87. The applications were
15 denied initially and on reconsideration. Tr. 102-05, 110-23. Plaintiff appeared
16 before an administrative law judge (ALJ) on November 7, 2019. Tr. 33-59. On
17 November 27, 2019, the ALJ denied Plaintiff’s claim. Tr. 12-32.

18
19 ² Plaintiff previously applied for benefits on October 5, 2007, which was denied at
20 the initial level; Plaintiff did not appeal the denial. Tr. 63.

1 At step one of the sequential evaluation process, the ALJ found Plaintiff,
2 who met the insured status requirements through September 30, 2021, has not
3 engaged in substantial gainful activity since December 31, 2017. Tr. 17. At step
4 two, the ALJ found that Plaintiff has the following severe impairments: lumbar
5 degenerative disc disease, fibromyalgia, and obesity. Tr. 18.

6 At step three, the ALJ found Plaintiff does not have an impairment or
7 combination of impairments that meets or medically equals the severity of a listed
8 impairment. Tr. 20. The ALJ then concluded that Plaintiff has the RFC to perform
9 light work with the following limitations:

10 [Plaintiff] is able to lift/carry 20 pounds occasionally and 10 pounds
11 frequently. She can stand and/or walk (with normal breaks) for 6
12 hours in an eight-hour workday, and sit (with normal breaks) 6 hours
13 in an eight-hour workday. She can push/pull unlimitedly within those
14 exertional limitations. She can frequently climb ramps and stairs.
15 She can never climb ladders, ropes, or scaffolds. She can frequently
16 balance, stoop, kneel, and crouch. She can occasionally crawl. She
17 should avoid concentrated exposure to extreme cold vibrations, and
18 workplace hazards, such as working with dangerous machinery and
19 working at unprotected heights.

20 Tr. 21.

At step four, the ALJ found Plaintiff is capable of performing her past
relevant work as a physical instructor and a sales clerk. Tr. 27. The ALJ did not
make an alternative step five finding. Therefore, the ALJ concluded Plaintiff was
not under a disability, as defined in the Social Security Act, from the alleged onset
date of December 31, 2017, through the date of the decision. Tr. 28.

1 On July 22, 2020, the Appeals Council denied review of the ALJ's decision,
2 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
3 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 **ISSUE**

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her disability insurance benefits under Title II and supplemental security income
7 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
8 issue for review:

9 1. Whether the ALJ conducted a proper step-two analysis.
10 ECF No. 18 at 2.

11 **DISCUSSION**

12 **A. Step Two**

13 Plaintiff contends the ALJ erred at step two by failing to identify her mental
14 health conditions as severe impairments. ECF No. 18 at 7-14.

15 At step two of the sequential process, the ALJ must determine whether the
16 claimant suffers from a "severe" impairment, i.e., one that significantly limits
17 his/her physical or mental ability to do basic work activities. *Id.* When a claimant
18 alleges a severe mental impairment, the ALJ must follow a two-step "special
19 technique" at steps two and three. 20 C.F.R. §§ 404.1520a, 416.920a. First, the
20 ALJ must evaluate the claimant's "pertinent symptoms, signs, and laboratory

1 findings to determine whether [he or she has] a medically determinable
2 impairment.” 20 C.F.R. §§ 404.1520a(b)(1), 416.920a(b)(1). Second, the ALJ
3 must assess and rate the “degree of functional limitation resulting from [the
4 claimant’s] impairments” in four broad areas of functioning: understand,
5 remember, or apply information; interact with others; concentrate, persist, or
6 maintain pace; and adapt or manage oneself. 20 C.F.R. §§ 404.1520a(b)(2)-(c)(4),
7 416.920a(b)(2)-(c)(4). Functional limitation is measured as “none, mild, moderate,
8 marked, and extreme.” 20 C.F.R. §§ 404.1520a(c)(4), 416.920a(c)(4). If
9 limitation is found to be “none” or “mild,” the impairment is generally considered
10 to not be severe. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1). If the impairment
11 is severe, the ALJ proceeds to determine whether the impairment meets or is
12 equivalent in severity to a listed mental disorder. 20 C.F.R. §§ 404.1520a(d)(2)-
13 (3), 416.920a(d)(2)-(3).

14 Step two is “a de minimus screening device [used] to dispose of groundless
15 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying
16 our normal standard of review to the requirements of step two, [the Court] must
17 determine whether the ALJ had substantial evidence to find that the medical
18 evidence clearly established that [Plaintiff] did not have a medically severe
19 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687
20 (9th Cir. 2005).

1 The ALJ found Plaintiff's depressive disorder, attention deficit hyperactivity
2 disorder (ADHD), and posttraumatic stress disorder (PTSD) are not severe
3 impairments. Tr. 18-20. The ALJ found Plaintiff has only mild limitations in all
4 four broad functional areas. Tr. 19-20. In support of the finding Plaintiff's mental
5 impairments are non-severe, the ALJ cited to medical records that document
6 Plaintiff's generally normal behavior, eye contact, hygiene/grooming, mood,
7 affect, cognition, orientation, thoughts, speech, insight/judgment, memory,
8 attention, and fund of knowledge. Tr. 18-20. The ALJ also noted that Plaintiff
9 refused a behavioral health referral, and later had improvement with treatment. Tr.
10 18-19.

11 First, Plaintiff argues the ALJ erred in finding her mental impairments are
12 non-severe because the ALJ failed to consider the abnormal findings in the record.
13 ECF No. 18 at 7-10. An ALJ must consider all of the relevant evidence in the
14 record and may not point to only those portions of the records that bolster his
15 findings. *See, e.g., Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001)
16 (holding that an ALJ cannot selectively rely on some entries in plaintiff's records
17 while ignoring others). The ALJ is not permitted to "cherry pick" from mixed
18 evidence to support a denial of benefits. *Garrison v. Colvin*, 759 F.3d 995, 1017
19 n.23 (9th Cir. 2014). The ALJ noted that Plaintiff had some abnormalities on
20 examination, including Plaintiff appearing as depressed, tearful, anxious, angry,

1 and/or pressured, but she generally had normal mental status findings. Tr. 18.
2 Plaintiff argues the ALJ ignored evidence of Plaintiff having pressured speech and
3 being tearful, ECF No. 18 at 9, however both abnormalities were reflected in the
4 ALJ's analysis. Plaintiff also argues the ALJ failed to address evidence she had
5 difficulty concentrating, but Plaintiff points to only two occasions when Plaintiff
6 was tangential and required redirection. ECF No. 18 at 9 (citing Tr. 406, 560).
7 The ALJ cited to multiple occasions when Plaintiff had normal attention
8 span/focus. Tr. 18 (citing Tr. 336, 376, 390, 398, 548, 553). The ALJ also
9 considered Plaintiff's activities that demonstrated no more than mild concentration
10 limitations, such as her ability to concentrate on driving for a five-hour drive. Tr.
11 29. Plaintiff does not cite to any other evidence in support of the argument that the
12 ALJ failed to consider all of the objective evidence.

13 Plaintiff also argues the ALJ erred in rejecting the uncontroverted opinion
14 that she has mental impairments, as she has been diagnosed with PTSD, ADHD,
15 depression, and anxiety. ECF No. 18 at 7-8, ECF No. 20 at 5. Plaintiff argues
16 there is a more stringent standard than *de minimis* at step two when there is an
17 uncontroverted diagnosis in the record. *Id.* (citing *Edlund*, 253 F.3d at 1158).
18 However, Plaintiff has conflated two different standards applicable to different
19 issues in Social Security cases. The Court in *Edlund* found the ALJ had not
20 provided clear and convincing reasons to reject an uncontroverted opinion of an

1 examining provider, who opined Plaintiff's mental impairment caused severe
2 limitations. *Edlund*, 253 at 1158. The Court explicitly stated that the ALJ's failure
3 to provide clear and convincing reasons to reject the opinion impacted the step two
4 findings, and the ALJ's step two analysis thus did not meet the *de minimis*
5 standard. *Id.* Here, the ALJ considered Plaintiff's diagnoses, and there are no
6 opinions in file that Plaintiff has a mental impairment that causes more than
7 minimal limitations, thus there are no opinions to which the clear and convincing
8 standard would be applicable. Further, Plaintiff's application was filed after March
9 27, 2017, and the new medical opinion regulations would apply, which Plaintiff
10 does not address. *See Revisions to Rules Regarding the Evaluation of Medical*
11 *Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. §§
12 404.1520c, 416.920c. As such, Plaintiff has not met her burden in demonstrating
13 the ALJ erred in cherry picking the record nor in rejecting any mental health
14 diagnosis or medical opinion.

15 Second, Plaintiff argues the ALJ erred in citing to evidence of her symptom
16 improvement. ECF No. 18 at 10-11. Plaintiff argues one citation in which Plaintiff
17 reported improvement with over-the-counter supplements should not have been
18 considered because the evidence predates the alleged onset date. *Id.* at 10.
19 Plaintiff also argues the evidence of her improvement in September 2019 fails to
20 account for the cyclical nature of her symptoms. *Id.* at 11-12. The effectiveness of

1 treatment is a relevant factor in determining the severity of a claimant's symptoms.
2 20 C.F.R. §§ 404.1529(c)(3), 416.913(c)(3); *see Warre v. Comm'r of Soc. Sec.*
3 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). In June 2017, Plaintiff reported
4 improvement in her mood with over-the-counter Lithium. Tr. 18 (citing Tr. 308).
5 This reported improvement was ten months prior to the alleged onset date.
6 However, Plaintiff continued to report taking vitamins/supplements in 2018, Tr,
7 361, and August in 2019, she specifically reported she was taking the over-the-
8 counter Lithium orotate supplement. Tr. 552. Plaintiff also reported she was
9 feeling much better emotionally in September 2019, and her provider noted
10 Plaintiff's ADHD and depression were clinically improved with medication and
11 treatment. Tr. 19 (citing Tr. 567, 570). Plaintiff also reported her therapy reduced
12 the impact of her PTSD. Tr. 18 (citing Tr. 553). While Plaintiff argues the ALJ
13 failed to account for the cyclical nature of her symptoms, ECF No. 18 at 10-11, the
14 ALJ cited to numerous visits where Plaintiff had generally normal examinations,
15 and the ALJ reasonably found Plaintiff's mental impairments improved with
16 treatment.

17 Next, Plaintiff argues the ALJ erred in considering Plaintiff declining a
18 behavioral health referral, because the ALJ failed to consider why Plaintiff did not
19 pursue treatment. ECF No. 18 at 10-11. Social Security Ruling 16-3p instructs
20 that an ALJ "will not find an individual's symptoms inconsistent with the evidence

1 in the record on this basis without considering possible reasons he or she may not
2 comply with treatment or seek treatment consistent with the degree of his or her
3 complaints.” Social Security Ruling (“SSR”) 16-3p at *8 (March 16, 2016),
4 *available at* 2016 WL 1119029. Plaintiff cites to a record where she refused a
5 referral to a psychiatrist because she felt the provider just wanted to obtain more
6 money. ECF No. 18 at 11 (citing Tr. 371). However, this record does not offer an
7 explanation as to why she refused behavioral health treatment. Plaintiff also cited
8 to a record where the provider noted Plaintiff had declined both psychiatry and
9 behavioral health referrals as Plaintiff reported she does not believe the referral to
10 behavioral health is appropriate, and her opinion as a fitness professional with a
11 nutrition degree should be trusted. ECF No. 18 at 11 (citing Tr. 373). Plaintiff
12 argues she did not understand her conditions required treatment. ECF No. 18 at
13 11. However, Plaintiff refused the behavioral health referral in May 2018, Tr. 317,
14 and reported she was agreeing to the behavioral health referral because “the state
15 will make me do it” in order for her to receive financial benefits. Tr. 373. Plaintiff
16 did not seek treatment until January 2019, and when seen for her intake, Plaintiff
17 reported she was seeking behavioral health treatment due to a referral from her
18 health provider and the recommendation of her Social Security representative. Tr.
19 512. Plaintiff does not cite to any evidence of a provider opining Plaintiff has
20 impaired understanding of her conditions or need for treatment, and her insight and

1 judgment have been documented as normal, Tr. 341, 551, 553. The ALJ
2 reasonably found Plaintiff's refusal of a behavioral health referral supported the
3 conclusion that Plaintiff's mental impairments not severe. Additionally, Plaintiff
4 has not challenged the ALJ's rejection of her symptom claims and thus has waived
5 the argument that the ALJ improperly rejected her claims of disabling mental
6 limitations. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
7 (9th Cir. 2008).

8 Further, any error is harmless. While plaintiff argues her mental
9 impairments cause her to be limited to only simple work, ECF No. 18 at 13,
10 Plaintiff does not cite to any medical providers who opined Plaintiff is limited to
11 simple tasks, nor does Plaintiff cite to any objective evidence that demonstrates
12 Plaintiff is unable to perform more than simple tasks. As such, Plaintiff makes no
13 showing that any of her mental impairments creates limitations not already
14 accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10 (the party challenging
15 the ALJ's decision bears the burden of showing harm). Any error at step two is
16 thus harmless. *See Molina*, 674 F.3d at 1115. Plaintiff is not entitled to remand on
17 these grounds.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is supported by substantial evidence and free of harmful legal error.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
6 Defendant and update the docket sheet.

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

8 3. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
9 **GRANTED**.

10 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

11 The District Court Executive is directed to file this Order, provide copies to
12 counsel, and **CLOSE THE FILE**.

13 DATED February 2, 2022.

14 s/Mary K. Dimke
15 MARY K. DIMKE
16 UNITED STATES DISTRICT JUDGE
17
18
19
20